IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

EXITEXCHANGE CORP., a Texas corporation, Plaintiff, vs. CASALE MEDIA INC., an Ontario corporation; ADCHEMY, INC., a Delaware corporation; BELO CORP., a Delaware corporation; BELO INTERACTIVE, INC., a Delaware corporation; CPX INTERACTIVE LLC, a New York limited liability company; EXPONENTIAL INTERACTIVE, INC., a Delaware corporation; MEDIAFIRE LLC, a Texas limited liability company; OPTIMAX MEDIA DELIVERY LLC, a California limited liability company; PULSE 360, INC., a Delaware corporation; SUBURBAN COMMUNITY NEWSPAPERS, LLC, a Mississippi limited liability company; TRAFFICMARKETPLACE, INC., a Delaware corporation; VALUECLICK, INC., a Delaware corporation; THE WEATHER CHANNEL INTERACTIVE, INC., a Georgia corporation. Defendants.	CASE NO. 2:10-cv-297-TJW **Jury Trial Demanded**

Joint Motion for Entry of Disputed Protective Order

The parties respectfully request that Court to enter a protective order for the above-referenced matter. The parties conferred and exchanged drafts for an agreed protective order, but agreement was not reached on all issues. The parties reached agreement on all items except whether the following category should be ineligible for designation under the protective order:

> "documents or information that has been discerned through legal examination of the accused product itself without the use of Defendants' Confidential, or Confidential Attorneys' Eyes Only Information, which includes all the claim charts provided as the Rule 3-1 disclosure"

See Exh. A, ¶4(h). Plaintiff's position is that the category should be eligible for designation under the protective order. Accordingly, paragraph 4(h) of the parties' proposed order should be deleted. Defendants' position is that the category should be ineligible for designation, and that paragraph 4(h) should be retained. Attached as Exhibit A is the proposed order, which includes the disputed language highlighted in brackets. Below is a statement of the parties' respective positions.

Plaintiff's position:

There is no reason to exclude infringement contentions from the protective order if they contain information that meets the definition of "confidential information," namely "confidential or proprietary technical, scientific, or business information that is not generally known, that would not normally be revealed to third parties, for which its disclosure would be detrimental to the conduct of the designating party's business." Exh. A ¶1. It is clear that ExitExchange's identification of how its patent claims read on specific systems used by its competitors is (i) confidential and proprietary information, (ii) is technical or business information, and (iii) is not generally known and would normally be revealed to third parties. In addition, the disclosure of the information would be detrimental to the conduct of ExitExchange's business, which includes maintaining a competitive advantage in on-line advertising markets by enforcing its patents. Such information could be used by ExitExchange's competitors (i) to attempt to design around the claims of the patent, (ii) to file declaratory judgment actions in other jurisdictions, or (iii) to

create mischief in reexamination proceedings. All of these would be detrimental to ExitExchange's competitive position.

Moreover, there is nothing in the local rules, the Federal Rules, this Court's case law, or Judge Ward's form protective order that contains a carve out for infringement contentions or similar documents. Defendants' assertion that infringement contentions cannot be designated under *Fractus, S.A. vs. Samsung Co.* is wrong. In *Fractus*, the parties agreed to a Protective Order that carved out "information that has been discerned through legal examination of the accused product itself." *See Fractus*, Case No. 6:09-cv-00203, dkt. #140; dkt #237. Here, Plaintiff has not agreed to such language in the protective order. Thus, Defendants' reliance on *Fractus* is misplaced.

Defendants' position:

Defendants request entry of their proposed Protective Order, including paragraph 4(h).

ExitExchange seeks to continue to designate documents or information as confidential even if they have been discerned merely through legal examination of the accused product itself without the use of Defendants' Confidential or Confidential Attorneys' Eyes Only Information. ExitExchange did this with the Patent Rules 1-1 claim charts in this case, resulting in the accompanying Defendants' Motion To Remove Confidential Designation On Patent Rule 3-1 Claim Charts And Resetting Times In Agreed Discovery Order. By extension of ExitExchange's logic, all court briefs could be designated "attorney eyes only" and/or "confidential," since seldom does a party publically disclose its legal analysis until it pleads in court. The Federal Circuit rejected a claim of confidentiality to legal analysis recently in *In Re Violation Of Rule 28(D)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011).

This Court has recently examined similar conduct by a plaintiff party and rejected the unilateral designation of infringement contentions as confidential. In *Fractus, SA v. Samsung Electronics Co.*, case no. 6:09-cv-203, Document 410, filed 06/07/10, Exhibit 2, Magistrate Judge Love utilizes language which Defendants in this case propose as appropriate for the Protective Order.

Dated: May 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served this 12th day of May, 2011, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Christin Cho